

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 20, 2001

STATE OF TENNESSEE v. BILLY E. BILES

**Appeal from the Circuit Court for Warren County
No. F-7245 Charles D. Haston, Judge**

No. M1998-00650-CCA-R3-CD - Filed August 31, 2001

The Defendant, Billy E. Biles, entered a guilty plea to one count of possession with intent to sell a schedule II controlled substance (0.5 grams of cocaine) and one count of simple possession of marijuana in the Circuit Court of Warren County in case #F-7245. The Defendant received an effective sentence of eight (8) years, and that sentence was ordered to run concurrently with Defendant's sentences in case #F-7289 and #F-7317. The Department of Correction placed him in the boot camp program for four months, and then, effective July 3, 1997, the Defendant was placed on probation for a term of seven years and nineteen days. Pursuant to Tenn. Code Ann. § 40-20-206, the Tennessee Department of Correction issued a Certificate of Probation to the Defendant. On October 3, 1997, Defendant's probation officer filed a petition to revoke Defendant's probation and to issue a warrant for his arrest. Following a subsequent hearing, the trial court revoked Defendant's probation, and Defendant challenges that revocation in this appeal. After a review of the record, we affirm the judgment of the trial court, revoking probation. However, we remand to the trial court to correct a clerical error in the judgment of Defendant's conviction in Count I of Case #F-7245.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed and Remanded to Correct a Clerical Error.**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J., and TERRY LAFFERTY, Sp. J., joined.

Quentin S. Horton, McMinnville, Tennessee (on appeal) and Russell L. Leonard, Cowan, Tennessee (at trial) for the appellant, Billy E. Biles.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Clement Dale Potter, District Attorney General; Robert W. Boyd, Assistant District Attorney General, for the appellant, State of Tennessee.

OPINION

On January 27, 1997, the Defendant pled guilty, in case #F-7245, to one count of possession of a schedule II controlled substance, to wit: cocaine in excess of 0.5 grams with intent to sell or deliver, and one count of simple possession of a schedule VI controlled substance, to wit: marijuana. The judgment, in the record on appeal, for case #F-7245 shows that the sentence in case #F-7245 was to be served concurrently with Defendant's sentences in case #F-7289 (four-year sentence for sale of cocaine) and #F-7317(eight-year sentence for the sale of cocaine). After four months in boot camp, the Defendant was placed on probation on July 3, 1997. Approximately three months after Defendant's probation became effective, a probation violation warrant was filed and served on the Defendant. The violation warrant alleged that Defendant had failed to report to his probation officer in August and September 1997, and failed to make monthly payments to the drug fund in August and September 1997.

During the revocation hearing, Joe Crawford, Defendant's probation officer, testified that he had thoroughly discussed the requirements of probation with the Defendant. Crawford acknowledged that he had previously served as the Defendant's probation officer, in an unrelated case, and that he had to revoke Defendant's probation in that case also, because the Defendant failed to comply with the conditions of his probation. Crawford also testified that, due to the need for the Defendant to be employed and to make monthly payments of \$135 to the drug funds of Warren County and the City of McMinnville, he permitted the Defendant to work in Davidson County. Crawford further testified that Defendant was allowed to schedule a monthly appointment at any mutually convenient time, rather than appear on Crawford's scheduled days of the first and third Monday of each month. Crawford said that he had not seen or heard from the Defendant, since his initial report and one phone call following Defendant's first week of work. Finally, Crawford testified that the Defendant had failed to report, and had failed to make his scheduled monthly payments in both August and September of 1997. Therefore, Crawford stated he had no other choice but to file for a violation of probation to be issued against the Defendant.

The Defendant testified that, while Crawford explained the conditions of his probation, he thought that Crawford was not requiring him to report monthly, only to make his monthly payments to the drug fund. The Defendant also testified that his work hours in Nashville prevented him from reporting to Crawford at Crawford's regularly scheduled appointment times. He also said that he had difficulty making the appointments, as well as his payments, because he was not permitted to drive. He further testified that he had given \$500 to a friend, who had agreed to make Defendant's drug fund payment. However, the friend had forgotten to make the payment. The Defendant's girlfriend, Joanne Fisher, testified that Thomas Gribble had given her the \$500 the Defendant had originally given him to drop-off at the probation office. She further stated that she had attempted to give the delinquent payments to Crawford, but he had rejected the payments.

The trial court upon hearing this testimony granted the petition to revoke and ordered that the Defendant serve his original eight-year sentence. From that decision, the Defendant now appeals.

ANALYSIS

The Defendant contends that the trial court erred when it revoked his probation and ordered him to serve his sentence in the Tennessee Department of Correction. We disagree.

Initially, we note that Defendant has failed to cite any authority in support of his argument. The failure to adequately brief issues raised in the appellate court will result in a waiver. Tenn. Ct. Crim. App. R. 10. The same result occurs when no legal authority is cited in support of the argument advanced. Tenn. R. App. P. 27(a); Tenn. Ct. Crim. App. R. 10(b). Thus, this issue has been waived.

Notwithstanding waiver, the Defendant is not entitled to relief on the merits. A trial court may revoke probation and reinstate the original sentence on finding by a preponderance of the evidence that a defendant has violated a condition of probation, and this Court reviews such revocation under an abuse of discretion standard, an abuse evinced only by a record devoid of substantial evidence that a violation has occurred. See Tenn.Code Ann. § 40-35-311(d); State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

The Defendant argues that his probation could not be revoked, when there was no original order of probation. Here, the Defendant signed a Certificate of Probation, issued by the Tennessee Department of Correction, which included the following:

7. I will allow my Probation Officer to visit my home, employment site, or elsewhere, and will carry out all instructions he/she gives, and report to my Probation Officer as given instruction to report.

The Defendant signed the Certificate of Probation, acknowledging that he understood the terms of his release and agreed to comply with the conditions of probation. The Certificate of Probation signed by the Defendant was not ambiguous and clearly set forth the terms of his probation, which the Defendant violated. Furthermore, the Defendant does not dispute the terms of his probation, as defined in the Certificate of Probation. Thus, we find no abuse of discretion in the trial court's reliance upon this Certificate of Probation to revoke the Defendant's probation.

Next, the Defendant claims that the trial court abused its discretion in revoking his probation based upon his failure to pay \$2,000 to the drug funds of Warren County and the City of McMinnville. We find that the failure to make drug fund payments may constitute a violation of the terms of probation if the trial court determines that nonpayment results from willful refusal to pay or failure to make sufficient bona fide efforts to pay. See State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986); State v. Massey, 929 S.W.2d 399, 402 (Tenn. Crim. App. 1996). However, nonpayment as a consequence of a legitimate inability to pay may not constitute the sole basis for revocation and subsequent imprisonment. See Massey, 929 S.W.2d at 402.

Although the record is devoid of an original order of probation, specifying the terms of Defendant's probation, we find the transcript of the revocation hearing sufficiently established the

original terms of the Defendant's probation. At the hearing, the trial court rejected the Defendant's stated reasons for his failure to make the monthly payments of \$135. The trial court find that the Defendant had not made sufficient efforts to make these payments. Thus, we conclude that there was substantial evidence to show that the defendant violated his probation; therefore, the trial judge did not abuse his discretion in revoking probation.

In his final issue, the Defendant asserts that the trial court erred in not granting him a continuance, in order to insure the presence of a material witness. The Defendant claimed that Thomas Gribble could testify regarding the money the Defendant had given him to make Defendant's drug fund payments. The continuance was not granted. However, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial judge and will not be disturbed on appeal unless there has been "a clear showing of abuse of that discretion." State v. Butler, 795 S.W.2d 680, 684 (Tenn. Crim. App. 1990). In this instance we find no abuse of discretion by the trial judge.

Finally, we note that the judgment for case #F-7245 contains a clerical error, in that it incorrectly describes the Defendant's conviction in Count I. The judgment states that the Defendant was convicted of "possession of a schedule II controlled substance, to wit: cocaine in excess of 0.5 grams." Moreover, the judgment also shows that the Defendant was convicted of a Class B felony under Count I, pursuant to Tenn. Code Ann. § 39-17-417. However, Defendant's guilty plea shows that he pled guilty to "possession of a schedule II controlled substance, to wit: cocaine in excess of 0.5 grams *with intent to sell or deliver*." Therefore, the language in the judgment appears to suggest that the Defendant was convicted of simple possession, which is a Class A misdemeanor under Tenn. Code Ann. § 39-17-418(c). We, therefore, remand for the trial court to file an amended judgment to indicate that the Defendant pled guilty of "possession of a schedule II controlled substance, to wit: cocaine in excess of 0.5 grams *with intent to sell or deliver*," as defined in §39-17-417(c)(1). See Tenn. R. Crim. P. 36 ("Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.").

CONCLUSION

For the foregoing reasons, we affirm the trial court's order revoking probation and reinstating the Defendant's original sentence. We also remand to the trial court for entry of an amended judgment correcting a clerical error.

THOMAS T. WOODALL, JUDGE